



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRA NO.147 OF 2013

CHRISPIN WAMALWA MUTENJE.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

(Appeal from judgment of Hon. P. N. Areri , Principal Magistrate

in

Bungoma Cr. No. 496 of 2012)

JUDGMENT

1. Chrispin Wamalwa Mujenje, the Appellant was on 5th March, 2012 arraigned before the Chief Magistrate's Court, Bungoma with two counts of being in possession of Imitation Firearm and Ammunitions. In Count 1, he was charged with being in possession of imitation firearm without a firearm certificate contrary to Section 4 (1) as read with Section 4 (3) of the Firearm Act Cap 114 Laws of Kenya. In count 2, he faced a charge of being in possession of ammunitions without a firearm Certificate contrary to Section 4 (1) as read with Section 4 (3) of the Firearm Act Cap 114 of the Laws of Kenya.

2. The particulars alleged that on 1st March, 2012, at Bungoma Township in Bungoma South District within Bungoma County, the Appellant was found in possession of imitation firearm and 2 rounds of 9 mm ammunitions without a firearm certificate. The Appellant denied the charges and after trial, he was convicted and sentenced to five (5) years imprisonment.

3. Dissatisfied with that decision, the Appellant has appealed to this court against both the conviction and sentence. He set out six (6) grounds of Appeal in his petition which can be summarised as:-

- a. the trial Court erred in convicting him on insufficient and contradictory evidence;
- b. the trial Court shifted the burden of proof and casually dismissed the Appellant's defence;
- c. the trial Court erred by entering into the arena of prosecution and failed to be an impartial umpire;
- d. that the trial Court erred in failing to appreciate the Appellant's explanation.

4. Mr. Athunga, learned Counsel for the Appellant submitted that PW1 identified the firearm as a homemade gun whilst PW2 called it a pistol; that what was produced was a gun; that the magazine and pouch were not produced in evidence; that the motor rider who was carrying the Appellant at the time of his arrest was not called although his evidence was crucial; that there is nothing like an imitation under the Firearm Act Cap 114 Laws of Kenya and that one does not require a certificate to own one; that the Appellant's explanation on how he had come into possession of the imitation firearm and ammunition was not considered and finally that the trial Court erred when it held that the Appellant was not ready to surrender the items to the Chief.

5. Mr. Kibellion, learned state Counsel opposed the Appeal. He submitted that there was no dispute that the Appellant was in possession of an imitation of firearm and two (2) 9mm ammunition; that the prosecution had explained how the arrest was effected after a tip off; that PW3 testified that on examining the items he concluded that the object fitted the description of a firearm under the Firearm Act, Cap 114 of the Laws of Kenya. He concluded that the Appellant's defence and explanations were properly considered and rejected by the trial Court. He urged that the Appeal be dismissed.

6. This being a first appeal, this court is obliged to re-evaluate the evidence afresh and come to its own independent conclusions and findings but bearing in mind that it did not see the witnesses testify. See **Okeno -vs- Republic [1972] EA.**

7. The prosecution case was that on the material day, PW1 and PW2 were on patrol within Bungoma town when they got a tip off that a gun was being ferried from Bungoma town to Ranje area. They laid an ambush at the Ranje junction and shortly a motorcycle arrived carrying a man called Chrispin Wamalwa (the Appellant). They searched the Appellant and found a firearm in a pouch tied around his waist and covered with a coat he was wearing. He tried to escape but they apprehended him. They also recovered from him two (2) rounds of 9 mm ammunition. They arrested him and took him to the station.

8. The recovered items were sent by PW4 for ballistic examination. On examination, PW3 found that the first object was a home made gun which had a barrel, firing cocking devise and attributes of a gun. He concluded that both the imitation and the two (2) 9 mm ammunition were a firearm and ammunition in terms of the definition under the Firearm Act (legal definition).

9. The Appellant gave unsworn evidence. He told the court that he comes from Ranje. On the material day, he found the items he was charged with while on his way to work; he hid them in his house until 10.00 a.m when he decided to take them to the Chief; on the way he was arrested and taken to the police station; that his explanation fell on deaf ears.

10. One thing that is not in dispute is the the imitation firearm and two (2) rounds of 9 mm ammunition were found in the possession of the Appellant. The Appellant did not dispute that fact. What he disputes, at least from his grounds of Appeal, is whether that imitation of firearm and ammunition were a firearm and ammunition in terms of the Firearm Act to require a certificate and whether his explanation as to possession amounts to a defence.

11. The first ground of Appeal was that the evidence was contradictory and insufficient. That PW1 and PW2 testified of a home made gun and pistol respectively. The record shows that what was recovered from the Appellant was a homemade gun according to PW3. In my estimation, that homemade guns may have been described variously by PW1 and PW2 according to their perception and understanding. The same was produced as Pexh1. PW3, a ballistic examiner upon examination found that the object was a firearm in terms of the Firearms Acts Cap 114. He produced his report Pexh3 which was never challenged. In that report, he concluded that the object amounted to or answered the legal I am satisfied that the object that the Appellant was found in possession was a firearm and the contradiction in the names or terms used by PW1 and PW2 in describing the same was not fatal to the prosecution case.

12. Section 2 of the Firearms Act Cap 114 of the laws of Kenya defines a fire arm as:-

“firearm’ means; a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adopted for the discharge of any shot bullet or other missile....”

13. According to PW3, the homemade gun was made up of a barrel, trigger mechanism, cocking mechanism, chamber pistol grip, body and a detachable rectangular metallic block having two chambers as a magazine. It was designed to chamber 9 mm parabellum rounds of ammunition. He also found that repeated attempts to test fire the home made gun, the same were unsuccessful due to the firing pin inability to give the primer sufficient blow to detonate it. He concluded that, that object was a firearm in terms of the Firearm Act. To my mind, looking at the legal definition of a firearm in Section 2 of the Act, the home made gun **'could be adopted for the discharge of any shot or bullet'** and in this case the 9 mm parabellum rounds of ammunition as found out by PW3. Accordingly

14. The Appellant submitted that the magazine and pouch in which the home made gun was found were not produced in court and that the motorcycle rider who was carrying the Appellant when he was arrested did not testify. That these made the prosecution case inconclusive.

15. The record does not show whether or not the magazine was produced as a separate component of Pexh 1. PW3 testified that he was presented with a home made gun on 23/3/2012 by Coporal Collins Otieno for examination the same day. He found that it had a barrel, firing cocking and device and attributes of a gun including a magazine for two 9 mm calibre. He identified Pexh 1 as the home made gun he had examined and prepared a report on, Pexh 3. In my view, the allegation that the magazine was not produced in evidence is an after thought. Pexh 1 was produced as one complete unit as recovered from the Appellant and presented to PW3 for examination. The Appellant never raised the issue of an alleged missing magazine with any of the prosecution witnesses. This I believe is because Pexh1 was produced as one complete unit. I reject the submission.

16. As regards the pouch, I hold the view that it was not necessary for its production as the possession of the imitation firearm and the two (2) 9 mm ammunition had not been disputed. Accordingly, how and where they had been secured by the Appellant was not an issue before the trial Court.

17. As regards the failure to call the motorcycle rider, I also do not think his evidence was necessary. PW1 and PW2 told the court that from the tip off, the gun was being ferried from Bungoma township to Ranje area. The ambush was laid at the Ranje Junction; that the motor cyclist came ferrying the Appellant; when the Appellant was asked why he did not surrender the gun and ammunition to the Chief at Bungoma town or police station he kept quiet. The Appellant did not challenge this piece of evidence during cross-examination. On the basis of **Bukenya -vs- Uganda [1972] EA 549** I hold the view that it is not the quantity but quality of evidence that sustains a conviction. I reject the contention.

18. The other ground of Appeal is that the trial court treated the Appellant's defence casually, failed to consider his explanation and shifted the burden of proof to the Appellant. From the judgment, the trial Court found that possession had not been denied. The court went to great deal to examine the Appellant's explanation on how and why he was in possession of the items. The court made a finding that since there was no explanation why the items were not surrendered to the Bungoma Police Station or the Chief of Bungoma Town, the explanation and defence of Appellant were unsustainable.

19. On the criticism levied against the trial Court that there was no evidence that the Appellant had by passed the Bungoma Police Station or Bungoma Chief, I have already found that the evidence of PW1 and 2 as to the direction where the gun was being transported was not challenged. It is clear from their evidence that the gun was leaving Bungoma Town to Ranje Area. It does not matter whether Ranje area was on the outskirts of Bungoma Town or miles away. The fact is that the Appellant failed to give an explanation to PW2 why he could not have surrendered the gun to the Chief of Bungoma Town or Bungoma Police Station. I am not agreeable that the court shifted the burden of proof to the Appellant as is contended. I reject those grounds.

20. The last ground of appeal was that the trial Court erred by entering the arena of prosecution and failed

to be an impartial umpire. It was submitted for the Appellant that the court erred in making conclusions that the Appellant did not intend to surrender the gun to his Chief. I do not find any justification in this ground. The trial Court made that conclusion after juxtaposing or comparing the Appellant's explanation with his failure to explain to PW2 why he could not have surrendered the gun to the Chief of Bungoma Town or the Bungoma Police Station.

21. In the premises, I find the appeal to be without merit and I dismiss the same.

DATED and DELIVERED at BUNGOMA this 28th day of July, 2014

A. MABEYA

JUDGE